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7 *Specially appearing as Attorney for:*
8 Counterdefendants, Hitek Software, LLC
9 and Melvin DeSilva

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 VBCONVERSIONS LLC, A California
13 Limited Liability Company,

14 Plaintiff,

15 vs.

16 EXIDA.COM LLC, a Pennsylvania
17 limited liability company aka EXIDA
18 LLC and EXIDA; JOHN
19 CHRISTMAN,

20 Defendants,

21 EXIDA.COM LLC; JOHN
22 CHRISTMAN

23 Counterclaimants,

24 vs.

25 VBCONVERSIONS LLC; DAVID A.
26 CROOK; HITEK SOFTWARE LLC;
27 MELVIN DESILVA PH.D

28 Counterdefendants,

CASE NO. 13-CV-8306PSG (JEMx)
[Assigned to Hon. Phillip S. Gutierrez]

**NOTICE OF MOTION AND
MOTION OF HITEK AND
DESILVA'S MOTION TO DISMISS
COUNTERCLAIMS FOR
INSUFFICIENCY OF SERVICE OF
PROCESS; LACK OF SUBJECT
MATTER JURISDICTION,
PERSONAL JURISDICTION,
FAILURE TO STATE A CLAIM,
REQUEST FOR RULE 11
SANCTIONS; AFFIRMATIVE
DEFENSES; MEMORANDUM OF
POINTS AND AUTHORITIES**

•
TIME: 1:30 p.m.

DATE: May 11, 2015

PLACE: Courtroom 880, Roybal Bldg.
Edward R. Roybal Building
255 East Temple Street
Los Angeles, CA 90012

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on May 11, 2015, at 1:30 p.m. in Courtroom
3 880 in the United States Courthouse located at 312 N. Spring Street, Los Angeles,
4 California 90012, the Honorable Phillip Gutierrez presiding, Counterdefendants
5 Hitek Software, LLC and Dr. Melvin Desilva will move pursuant to Federal Rule of
6 Civil Procedures Rule 19(a) and (b) for Improper Joinder of Parties and 12(b)(6) to
7 dismiss the First, Second, Third Causes of Action of the Counterclaim brought by
8 Defendants Exida.com and John Christman on the following grounds:

9 1. Defendants fail to properly join new parties Hitek and Desilva under
10 Rules 19(a) and 21.

11 2. Defendants fail to state a claim against Hitek and Melvin Desilva as it
12 has made only conclusory allegations regarding allegations regarding their
13 Counterclaims One through Three.

14 3. Defendants fail to state a claim against Hitek and Melvin Desilva as he
15 has made only conclusory allegations regarding allegations regarding their claims of
16 fraud which do not comply with Rule 9.

17 This Motion is base on this Notice of Motion and attached Memorandum of
18 Points and Authorities, on all judicially noticeable documents, on all pleadings and
19 papers on file in this action, the Declaration of Melvin Desilva, and on other such
20 matters and arguments as may be presented to this Court in connection with this
21 Motion.

22 DATED: April 15, 2015

Respectfully submitted,

23 

24
25 Heather Bennett
26 Attorney for Hitek and Desilva
27

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant's March 25, 2015 counterclaim--an 11th-hour attempt to join new parties--is improper, unfounded, and unsubstantiated both factually and procedurally. This 6 months after the Last Day to Add Parties and only 3 weeks prior to Discovery Cut Off. This untimely attempt to join a party is unfounded and highly prejudicial to Hitek in depriving them of their due process rights in defending against serious counterclaims of fraud and trespass to chattel.

Defendants' untimely counterclaims fall far short of setting forth the necessary facts addressing the four (4) factors required to qualify Counterclaimants as an indispensable party. It also falls far short of setting forth facts "with particularity" as required for claims of fraud under Rule 9(b).

Defendants show no facts that either Hitek or Desilva ever made a claim of copyright ownership in Plaintiff's VBConversion software, and Defendants cannot *force* it to do so by means of an untimely counterclaim. The Counterclaim fails to offer an iota of facts demonstrating Hitek participated with writing VBConversions, participated with VBConversion's application for registration of VBConversions at the United States Copyright Office, VBC's licensing with third parties for usage of VBC, or VBC's claims of infringement. Defendants cannot create an obligation for Hitek to make a copyright claim to the Copyright Office and then allege Hitek committed fraud on the Copyright Office by not telling the Copyright Office that it had a copyright claim to VBC. Certainly, this sort of fictitious circular argument does not meet the special pleading rules of Rule 9(b). Likewise, Defendants claims of fraud and trespass to chattels are barred by their respective statute of limitations since these actions took place over five years ago. Even if they had set forth the

1 proper analysis required by Rule 19 , Defendants waived their right to raise this
2 issue by delaying over two years—and six (6) months after the court-ordered Last
3 Day to Add Parties and three (3) weeks prior to Discovery Cut Off)-- to bring this
4 motion when they have known about about Hitek and Desilva since the day
5 Plaintiffs filed this action on November 2013.

6 In light of the total absence of facts coupled with the prejudice to Hitek and
7 Desilva caused by Defendants' unwarranted delay, it is proper for the Court to
8 Dismiss with prejudice Defendants joinder and addition of new counterclaims
9 implicating Hitek and Desilva. It is further proper for the Court to dismiss these
10 claims with prejudice in that, even if Defendants could demonstrate Hitek and/or
11 Desilva had an interest in the VBC, any such claims for copyright infringement are
12 by now barred by the statute of limitations in that Exida's downloads occurred in
13 November and December of 2010, which is almost five years ago. Because
14 Defendants claims are meritless and clearly done for the improper purpose to harass
15 and annoy Hitek, Rule 11 sanctions are appropriate.

16 **II. STATEMENT OF FACTS**

17 Hitek is a California Limited Liability Company with a principal place of
18 business at 5423 Throne Ct, Santa Barbara, California 93111. *See Fourth Amended*
19 *Complaint "FAC."* Hitek is a software company that develops and markets data
20 automation software and services. In other words, it develops software which
21 automates the collection, organization and reporting of large amounts of data. It
22 offers both products and services to third parties to help them manage data. See
23 *Declaration of Melvin Desilva (hereinafter "Desilva Decl")* . Hitek holds the
24 Copyright Registrations for over 14 software programs, none of which have any
25 pertain to language conversion programs written and/or distributed by VBC. *See*
26 *Exhibit A to Desilva Decl*. One of the services it offers is referred to as Tracking
27 System, which allows users to track and manage data regarding usage of the third

1 parties software programs. Its data sorting functionality exists on Hitek's computers.
2 When a third party desires use of Hitek's data automating services, Hitek provides
3 them with Tracking Specification which allows the user's computer to send data to
4 Hitek's computer. *Id.* Third parties desiring to use Hitek's data collection
5 automating products and services do so by means of a license agreement. *Id.*

6 Beginning on or about 2005, VBC signed a license agreement with Hitek for use
7 of its data collection service referred to as Tracking System services. *See License*
8 *Agreement attached to Desilva Decl as Ex. B.* In executing the services, Hitek issues
9 about 400 lines of code to its customers which is needed in order for data to be sent
10 to Hitek's computers where the Hitek's data-sorting software resides and the data
11 services are performed. *Id.* When the data is sorted by Hitek's software, Hitek
12 generates a report or "proofs" according to the parameters specified by the
13 customer. *See reports "proofs" on Exida.com attached as Exhibit C to Desilva Dec.*

14 On or about November 7, 2013, Plaintiffs VBC Conversions LLC ("VBC") filed
15 an action for Copyright Infringement of its software program Visual VB
16 Conversions ("VB Conversions") by Defendants Exida.com (hereinafter
17 "Complaint"). VBC is an LLC with a principal place of business in Los Angeles,
18 California. Its Software program VB Conversions converts from Virtual Basic
19 computer language to C # language at a high speeds. The conversion saves
20 companies time and labor. *See Complaint pp. 5-6.* Defendant Exida.com is a
21 Pennsylvania company. *Id.* VBC's Complaint includes a statement: "**Collecting of**
22 **Information Concerning Infringement** . . . VBC has adopted a tracking system
23 whereby the Copyrighted Software reports it use to VBC's servers and to servers
24 maintained by a third-party registration-tracking company, Hitek Software LLC of
25 Goleta, CA ("Hitek") VBC is thereby able to identify the date and time of the
26 unlicensed use." *See Complaint at p. 8, ¶¶ 25-26.* Hitek's proofs were used by
27 VBC to detect and substantiate Exida's use of the VBC software and were attached

1 to VBC's Complaint. *See Ex C of VBC's Complaint.*

2 On September 29, 2014, the Court issued its Scheduling Orders which lists the
3 last date to add parties:

4 Last Day to Add Parties 11/06/2014

5 Discovery Cut-Off 4/14/2015

6 The first time Hitek Defendants propounded Discovery on Hitek was not until
7 January 2015. Pursuant to Defendants' Request for Production Documents dated
8 January 2015, Hitek provided documents showing the license agreement and the
9 Tracking Specifications. *See Desilva Dec.* Despite knowing about Hitek's Tracking
10 System for over 2 years during litigation by Plaintiff VBC, Defendants failed to
11 propound Discovery regarding Hitek's role until December, *after* the Last Day to
12 Add Parties had passed. Even once it had received the Responses to Interrogatories
13 in January 2015, it failed to bring a proper motion under Rule 19 establishing Hitek
14 in a timely manner. Rather, it waited another two months until March 25, 2015, only
15 three (3) weeks prior to the Discovery Cut Off date.

16 **III. STANDARDS OF REVIEW**

17 **A. STANDARD FOR JOINDER, RULE 19(B)**

18 FRCP Rules 19 and 20 set forth the rules for joining a party within a
19 counterclaim to an already existing lawsuit. *See FRCP 13(h)*. Therefore, adding
20 Hitek requires Defendants to satisfies Rule 19(a) and (b) and Rule 20. The party
21 alleging joinder has the burden of demonstrating that a missing party is needed for a
22 just adjudication under Rule 19(a) or is "indispensible" under Rule 19(b). *Pullitzer-*
23 *Polster v. Pulitzer 784 F.2d 1305, 1309 (5th Cir. 1986).*

24 **B. STANDARD FOR RULE 12(B)(6)**

25 A motion to dismiss under Rule 12(b)(6) tests whether the complaint "contains
26 sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible
27

1 on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)

2 In addition, the pleading’s factual allegations must show “that the pleader is
3 entitled to relief. *FRCP 8(a)(2)(emphasis added)*. The purpose of plausibility
4 requirement is “to prevent settlement extortion—using discovery to impose
5 asymmetric costs on defendants in order force a settlement advantageous to the
6 Plaintiff regardless of the merits of his suit. *Pension Benefit Guar. Cor. Ex rel.*
7 *St.Vincent Catholic Med. Ctrs Retirement Plan v. Morgan Stanley Investment Mgmt.*
8 *Inc.* 712 F.3d. 705, 719 (2nd Cir. 2013).

9 IV. LEGAL ANALYSIS

10 A. Declaratory Judgment Claims

11 Counterclaimants seek declaratory judgment on two of their three claims
12 under Federal Declaratory Judgment Act, Title 28 U.S.C. § 2201. The following
13 law applies: “We have repeatedly characterized the Declaratory Judgment Act as ‘an
14 enabling Act, which confers a discretion on the courts rather than an absolute right
15 upon the litigant.’” *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241
16 (1952). “Consistent with the nonobligatory nature of the remedy, a district court is
17 authorized, in the sound exercise of its discretion, to stay or to dismiss an action
18 seeking a declaratory judgment before trial or after all arguments have drawn to a
19 close. In the declaratory judgment context, the normal principle that federal courts
20 should adjudicate claims within their jurisdiction yields to considerations of
21 practicality and wise judicial administration.” *Wilton v. Seven Falls Co.*, 515 U.S.
22 277, 288 (1995).

23 Here the Declaratory Relief is nothing more than state-law claims and seek
24 more than mere declarations. Therefore, the court should look at the lack of facts to
25 support the underlying causes of action.

B. Defendants Counterclaims Fail to State Facts Sufficient to Establish Counterdefendants Hitek As Necessary or Indispensible Parties

Counterclaimants' invalidation claim depends on the allegation that, "[u]pon information and belief, Hitek and/or Melvin Desilva contributed source code to the VBC and are therefore additional contributors, authors and/or owners of VBC's Software." Counterclaim, ¶ 55. This assertion is unavailing. The Tracker's function is to gather data it for the purpose of determining whether unauthorized access has occurred by a person or entity. What the Tracker does is set out in great detail in the EULA. See *Paragraphs 25, 26 & 27 of the F.A.C. and Exhibit "D," Paragraph 12*. Even the Counterclaimants agree what the function of the Tracker is at their Paragraph 38 of the Counterclaim. This has nothing to do with VBC's conversion software, which is what VBC desires to register.

Section 17 U.S.C. §501(b) of the Copyright Act establishes who may sue for infringement of a copyright: "The *legal or beneficial owner* of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it." This supports the assertion that Hitek's Tracker and the Program are distinct in the source code, serving different functions and different masters. The Copyright Office was not misled because the Tracker source code does not embody an Exclusive Right of Copyright to the Program and thus has no effect on the Program's ability to issue licenses and convert VB to C#. Hitek is therefore not entitled to a share of the profits of the enterprise and may not transfer or convey any right of ownership. The rights spelled out in 17 U.S.C. §201(d) are not available to Hitek. For this reason, Hitek and Dr. Desilva have joined the instant motion to confirm that neither asserts any copyright interest in the Software.

It is also significant that Counterclaimants fail to allege the transfer of any of

1 the Exclusive Rights of Copyright to Hitek. *See* 17 U.S.C. § 106 (1-6). Nowhere in
 2 the Counterclaim is it alleged that Hitek's Tracker can reproduce code, create a
 3 derivative work, distribute the work, or perform or display the work. There can be
 4 no joint authorship absent at least an assertion by Hitek of a copyright interest in the
 5 Software. Based on the foregoing, it is clear that there is no intent to create co-
 6 authors from the relationship of Hitek and VBC. Intent is crucial to a determination
 7 of whether they are joint authors and Counterclaimants cannot impose it by
 8 hypothetical allegations. §17.7, *Copyright Interests-Joint Authors* (17 U.S.C.
 9 §§101, 201(a)), *Model Jury Instructions, Civil, West Group, 2001*. The issue here is
 10 whether a fraud upon the Copyright Office has occurred with respect to the program
 11 entitled *VB.NET to C# Converter*. Counterclaimants offer *nothing* to show that such
 12 a misrepresentation occurred.. "Absent intent to defraud and prejudice, inaccuracies
 13 in copyright registration do not bar actions for infringement." *Harris v. Emus*
 14 *Records Corp.*, 734 F.2d 1329, 1335 (9th Cir.1984).

15 Here, counterdefendants Hitek have not shown any action or intention in
 16 claiming a copyright interest in VBC. In fact, because Hitek expressly disavows any
 17 interest in VBC, they cannot be considered indispensable. Furthermore, because any
 18 copyright claims Hitek might have made against Defendants would be barred by the
 19 statute of limitations, they could not bring a claim against Defendants even if they
 20 wanted to. Likewise, Hitek is not an indispensable party to Defendants
 21 counterclaims of fraud and trespass to chattel since the statute of limitations serves
 22 as a bar to those claims as well.

23 The factors a Court must considered in determining a Rule 19(b) joinder are as
 24 follows:

- 25 • The extent to which its judgment may prejudice the absent party. In
 26 assessing this, Courts must consider whether any claimed prejudice to the
 27 absent party would be "immediate and serious, or remote and minor. *CP*
Solutions PTE, Ltd. General Elec. Co. 553 F.3d 156, 160 (2nd Cir. 2009);

- The extent to which such prejudice may be lessened or avoided by protective provisions in the judgment, or other measures;
- Whether a judgment rendered in such person's absence will provide an adequate remedy to the parties before the court

A party is deemed "necessary" to join if that party claims an interest relating to the subject matter of the action and whose absence will leave any of the existing parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. *FRCP 19(a)(1)(B)*, *See Provident Tradesmens Bank & Trust Co. v. Patterson* 309 U.S. 102, 110-111 (1968). The absent party's disavowal of any interest at stake in the present litigation precludes a finding of indispensability: "(A) defendant intervenor's declaration that it is not indispensable satisfies any concern that a decision in its absence would have prejudiced it. *Mattel, Inc. v. Bryant* 446 F.3d. 1011, 1013 (9th Cir. 2009). Failure to join a party needed for a just adjudication—but who is not "indispensable"—is waived if not timely asserted. *Northeast Drilling, Inc. v. Inner Space Services, Inc.* 243 F.3d. 25, 26-27 (1st Cir 2001). Rule 19(b) contemplates that the parties actually before the court must pursue any avenue available for eliminating the threat of prejudice. *Associated Dry Goods Corp. v. Towers Fin'l Corp* 920 F.2d. 1121, 1124 (2nd Cir. 1990).

Since Hitek is not and can never be either an indispensable or necessary party to any claims in this action, the Court should dismiss the counterclaims against Hitek and Desilva with prejudice.

C. Conclusory Statements Cannot Serve as Facts to Support A Claim

Counterclaimants' first claim seeking a finding of non-infringement is devoid of requisite factual content. The claim depends on the conclusion that "VBC, Crook, Hitek, and Desilva all have some claim to the right, title or interest in and to the allegedly infringed Software, making them indispensable parties to this litigation."

1 Counterclaim, ¶ 41. No facts are alleged to support this conclusory statement.
2 Rather, the assertion is made “[u]pon information and belief.” *Id.*
3 Counterclaimant’s “belief” is based on another conclusory statement that “Hitek
4 and/or Melvin Desilva contributed source code to the Software and are additional
5 contributors, authors and/or owners of the Software.” *Id.*, ¶ 33. Because this
6 statement, too, is alleged “[u]pon information and belief,” the Court may decline to
7 hear the claim because no controversy is presented; Counterclaimants submit merely
8 their own unsubstantiated conclusions. Because “[o]nly well-pleaded factual
9 allegations, not its legal conclusions, are accepted as true,” Counterclaimants fail to
10 provide sufficient information to justify the relief they seek. *Phillips, supra*, 714
11 *F.3d at 1019*.

12 “Only well-pleaded factual allegations, not its legal conclusions, are accepted as
13 true.” *Phillips v. Prudential Ins. Co. of America*, 714 *F.3d 1017, 1019 (7th Cir.*
14 *2013)*. The court will not accept as true bald assertions, conclusions or inferences,
15 legal conclusions “couched” or “masquerading” as facts, or conclusions contradicted
16 by the complaint’s own exhibits or other documents of which the court may take
17 proper notice. *See Lazy Y Ranch Ltd. v. Behrens*, 546 *F.3d 580, 588 (9th Cir. 2008)*;
18 *Id.*, *Phillips*, at 1020. (*emphasis added*). Conclusory allegations of law and
19 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to
20 state a claim. *Apple Inc. v. Psystar Corp.*, 586 *F. Supp. 2d 1190, (2008)*. Although
21 the facts set forth the claim are taken to be true, the factual allegations must be
22 enough to raise a right to relief above the speculative level. *Bell Atlantic, supra*, at
23 555. The presumption of truth does not apply to conclusory allegations, legal
24 assertions or mere restatements of the elements of a claim. *Ashcroft v. Iqbal*, 556
25 *U.S. 662, 680-681 (2009)*. A court does not assume as true “complaints’s bare legal
26 conclusions.” *Bell Atlantic Corp. v. Twombly*, 550 *U.S. 544, 570 (2007)*. This
27 requirement “serves to prevent costly discovery on claims with no underlying

1 factual or legal basis. *Migdal v. Rowe-Price-Fleming Int'l, Inc* 248 F.3d 321, 328
2 (4th Cir. 2001).

3 **D. Defendants' Fail to Plead With The Requisite Particularity their**
4 **Counterclaims Asserting Hitek Committed Fraud on the United**
5 **States Copyright Office and Trespass to Chattels**

6 Counterclaimants posit that Plaintiffs and Counterdefendants Hitek
7 committed fraud on the copyright office when they submitted the application for
8 registration of VBC. Naturally, Counterclaimants fail to allege any facts supporting
9 this supposition. Rather, as they do throughout their pleading, they allege “[u]pon
10 information and belief” that the Software does not function as advertised and
11 therefore is not protectable as a computer program under the Copyright Act.
12 Counterclaim, ¶ 51. However, functionality is not the test for copyright registration;
13 originality is. Since Hitek never filed an application for registration of Copyright in
14 VBC, it cannot be said Hitek committed fraud. Because Hitek entered onto Exida’s
15 computer via a third party, Hitek had no control of the entry. Therefore, Exida
16 cannot prove it Hitek did either action. Finally, we come to Counterclaimants’
17 curious “trespass” claim. In a nutshell, they allege that Counterdefendants accessed
18 their computers and servers when Mr. Christman illegally accessed the Software,
19 and that this access “interfered with Exida’s possessory interest in its computer
20 system and servers.” Counterclaim, ¶ 65. It’s hard to tell what to make of this
21 contention. We’re back to the car thief again, only this time he’s complaining that
22 the car he stole is taking up too much space in his garage.

23 “One who commits a trespass to a chattel is liable to the possessor of the
24 chattel if the chattel is impaired as to its condition, quality, or value.” Restatement
25 (Second) of Torts § 218(b)). In the age of the Internet, it is possible to allege
26 electronic trespass to chattels where a computer system is impacted by, for example,
27

1 excessive spam messages, *e.g.*, *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (Cal. 2003),
2 or other instances of interference or invasion. Counterclaimants allege that the use
3 and capacity of their computer system was compromised, but fail to allege that its
4 system was impaired as to its condition, quality or value. More importantly, counsel
5 could find no legal precedent for electronic trespass to chattels where
6 “intermeddling” damages *were caused by the complainant’s illegally accessing*
7 *proprietary Software*. Absent legal authority applicable to our particular
8 circumstances, Counterclaimants have no legal basis to assert a trespass to chattels
9 claim. To avoid Rule 11 sanctions, allegations on information and belief must be
10 “likely (to) have evidentiary support after a reasonable opportunity for further
11 investigation or discovery. FRCP 11(b)(3).

12 Counterclaimants misrepresent the law in stating their claim of copyright
13 invalidity. They allege: “Copyright protection does not extend to any idea,
14 procedure, process, system, method of operation, concept, principle, or discovery,
15 regardless of the form in which it is described, explained, illustrated, or embodied,
16 which is what the Software is, if it does not bring about its result or function. See 17
17 U.S.C. § 102.” Counterclaim, ¶ 52. This statement misquotes Section 102(b) of the
18 Copyright Act. The actual quotation is: “In no case does copyright protection for an
19 original work of authorship extend to any idea, procedure, process, system, method
20 of operation, concept, principle, or discovery, regardless of the form in which it is
21 described, explained, illustrated, or embodied in such work.” See 17 U.S.C. §
22 102(b). The limitation expressed in Subsection (b) does not address the
23 functionality or operation of a process described in a copyrighted work; it only
24 confirms that copyright relates to the embodiment of the work. Copyright protects
25 expression, not function. Counterclaimants argument is misdirected.
26
27

1 Originality is a constitutional requirement. The source of Congress' power to
2 enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes
3 Congress to "secure for limited Times to Authors . . . the exclusive Right to their
4 respective Writings." The requisite level of creativity for copyright registration is
5 extremely low; even a slight amount will suffice. The writings which are to be
6 protected are *the fruits of intellectual labor*, embodied in the form of books, prints,
7 engravings, and the like." *Ibid.* (emphasis in original).

8 The vast majority of works make the grade quite easily, as they possess some
9 creative spark, "no matter how crude, humble or obvious" it might be. *Feist*
10 *Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (citing
11 [p*342] (citing *1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990), §*
12 *1.08[C][1]*). The writings which are to be protected are *the fruits of intellectual*
13 *labor*, embodied in the form of books, prints, engravings, and the like." *Ibid.*
14 (emphasis in original). Originality does not signify novelty; a work may be original
15 even though it closely resembles other works so long as the similarity is fortuitous,
16 not the result of copying. To illustrate, assume that two poets, each ignorant of the
17 other, compose identical poems. Neither work is novel, yet both are original and,
18 hence, copyrightable. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49,
19 54 (CA2 1936). In two decisions from the late 19th Century -- *The Trade-Mark*
20 *Cases*, 100 U.S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S.
21 53 (1884) -- this Court defined the crucial terms "authors" and "writings." In so
22 doing, the Court made it unmistakably clear that these terms presuppose a degree of
23 originality.

24 In determining whether a pleading adequately states a plausible claim for
25 relief, a court must first take "note of the elements a plaintiff must plead to state a
26 claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Allegations of fraud are subject
27 to the particularity requirement of Rule 9(b). In addition, allegations of fraud made

1 on information and belief must set forth the facts on which the belief is founded.
2 *Wool v. Tandem Computers, Inc.* 818 F.2d. 1433, 1430 (9th Cir. 1987). Plaintiff's
3 failure to meet the specific pleading requirements of Rule 9(b) can result in
4 dismissal of the complaint. *Vess v. Ciba-Geigy Corp. USA* 317 F.3d. 1097-1107-
5 1108 (9th Cir. 2003). Although a court ordinarily will grant leave to amend,
6 dismissal with prejudice is proper where the defect is not curable by amendment or
7 if plaintiff has failed to plead with particularity. *Id.*

8 In determining whether a pleading adequately states a plausible claim for
9 relief, a court must first take "note of the elements a plaintiff must plead to state a
10 claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Allegations of fraud are subject
11 to the particularity requirement of Rule 9(b). In addition, allegations of fraud made
12 on information and belief must set forth the facts on which the belief is founded.
13 *Wool v. Tandem Computers, Inc.* 818 F.2d. 1433, 1430 (9th Cir. 1987). The
14 complaint must state Plaintiffs' pre-filing efforts to obtain information needed to
15 plead with particularity. *Id.* A claim of fraud requires a showing: 1) Defendants
16 knowingly and intentionally made false statements of existing material facts. A claim
17 for fraud must show facts indicating: 1) Defendants intended the recipient to rely on
18 its material misrepresentation of fact; 2) The recipient reasonably and justifiably
19 relied on defendants' material misrepresentation, unaware of the falsity of defendants'
20 representations, and had a right to rely on the representations; 3) the recipient
21 suffered damages as a result of relying on defendants' misrepresentations of fact. A
22 claim for Trespass to Chattel, must show: 1) Defendant Hitek intentionally and
23 unreasonably interfered with Exicda's exclusive use, and enjoyment of its
24 personality, proximately causing injury to Exicda; 2) Defendant Hitek intentionally
25 invaded Exicda's reasonable and legitimate interest in its property, proximately
26 causing injury to Exicda; and 3) Defendant Hitek intentionally used and substantially
27 intermeddled with chattel in the possession of Exicda, proximately causing injury to

1 the Exida.

2 Because the counterclaims do not show Hitek did any of the above, their
3 claim that Hitek committed fraud or trespass fails and must be dismissed.

4 **E. Defendants' Fail to Establish Standing As a Private Attorney**
5 **General To Bring Their Claim of Fraud on Behalf of the United**
6 **States Copyright Office**

7 Counterclaimants' claim seeking non-infringement also fails because neither
8 Exida nor Mr. Christman has standing to assert it. The claim is the reverse of a
9 typical invalidation procedure based on alleged co-authorship, where one individual
10 argues he is a joint author of a work and is entitled to compensation for his
11 contribution. Here, Counterclaimants attempt to impose co-authorship status upon
12 two parties who have asserted no joint interest in the copyrighted work. As set forth
13 above, Counterclaimant's contentions as to Hitek's and Dr. Desilva's purported
14 interest in the work is assumed on "information and belief," there are no facts to
15 support the allegation. Hitek and Dr. Desilva have joined the instant motion to
16 clarify that neither asserts any rights in or to the Software.

17 "The federal courts are under an independent obligation to examine their own
18 jurisdiction, and standing 'is perhaps the most important of the jurisdictional
19 doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (U.S. 1990) The irreducible
20 constitutional minimum of standing contains three elements:

21 "First, the plaintiff must have suffered an 'injury in fact'-- an invasion of a
22 legally protected interest which is (a) concrete and particularized and (b) "actual or
23 imminent, not 'conjectural' or 'hypothetical'"...Second, there must be a causal
24 connection between the injury and the conduct complained of -- the injury has to be
25 "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the
26 result [of] the independent action of some third party not before the court." Third, it
27 must be "likely," as opposed to merely "speculative," that the injury will be
28 "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

1 560-561 (1992) (internal citations omitted).

2 Exida asserts its Counterclaim without a claimed legal or beneficial
3 ownership interest in the registered copyright of the Program. Counterclaimants
4 don't allege that VBC ever granted Hitek exclusive copyright interests that would
5 signify the creation of a co-authored work. They do not allege that Hitek ever
6 exercised care, custody or control over the Program, its development, growth,
7 marketing or licensing. Its "co-authorship" allegations rely on information and
8 belief. All Counterclaimants have is a discovery response that Hitek "contributed"
9 to VBC's Software, and that an agreement "indicates" that Hitek's tracking system
10 was "allegedly attached, appended to and delivered with" VBC's Software. See
11 Counterclaim, ¶¶ 31, 32. Counterclaimants do not allege that Hitek's work is
12 incorporated into VBC's registered copyrighted work; rather they refer to an
13 unidentified agreement suggesting that Hitek's work merely accompanies it. These
14 conclusory assertions are insufficient under the above controlling precedent. What
15 are Counterclaimants' injuries to a "protected interest"? What is the "causal
16 connection" to the damages it pretends it has? What "independent action" is
17 attributable to either Hitek or Dr. Desilva that is not wholly speculative? The
18 Counterclaim does not set forth any of these requisite elements, establishing that no
19 standing exists.

20 **F.. Counterclaims Are Moot Because the Statute of Limitations Have**
21 **Run.**

22 Counterclaimants alleges that if Crook, Hitek and Desilva are not joined as
23 indispensable parties to the litigation, they "will be subjected to substantial risk of
24 incurring double, multiple or otherwise inconsistent obligations" because these three
25 parties all claim ownership interests in the subject copyrighted work. Counterclaim,
26 ¶ 35. As discussed above, this allegation is speculative and unsupported. However,
27 even if it were true, there still would be no basis for Counterclaimants' arguments

1 regarding inconsistent outcomes.

2 Neither Hitek, nor Dr. Desilva has ever asserted that they possess copyright
3 interests that were infringed by Exida and Mr. Christman. By their silence and
4 inaction, both Hitek and Dr. Desilva confirm that neither claims an interest in the
5 subject copyright or asserts infringement by any other party. In light of these facts,
6 any putative claim that might have been asserted by either of these parties regarding
7 the Software is barred by the Statute of Limitations since the last act of alleged
8 infringement occurred November 7, 2010. At 17 U.S.C. §507. Because the
9 applicable Statute of Limitations has expired, the Counterclaimants are not in
10 jeopardy of “inconsistent claims” from Hitek or Dr. Desilva. Absent the possibility
11 of suffering an injury in fact due to expired claims asserted by these parties,
12 Counterclaimants’ “indispensability” argument is moot.

13 **V. AFFIRMATIVE DEFENSES**

14 Without prejudice to their denial of the allegations in Defendant/
15 Counterclaimant’s Counterclaim, Counterdefendants Hitek state as and for their
16 Affirmative Defenses as follows:

17 **First Affirmative Defense**

18 Defendants’ counterclaims against counterdefendants Hitek are barred, in
19 whole or in part, for failure to state a claim upon which relief can be granted.

20 **Second Affirmative Defense**

21 Defendants’ counterclaims against counterdefendants Hitek are barred, in
22 whole or in part, because Defendants’ attempt to add new parties exceeds the court-
23 ordered Last Day to Add Parties by almost 6 months and prejudices
24 counterdefendant’s rights to mount a defense when added only one month before
25 court-ordered Discovery Cut Off.

26 **Third Affirmative Defense**

27 Defendants’ counterclaims against counterdefendants Hitek are barred, in

1 whole or in part, because counterdefendants Hitek have no material interest in the
2 copyrights or the software at issue in this case and, as they have no interest in the
3 Plaintiffs' software, they are not needed for just adjudication of Defendants' right to
4 use or not use Plaintiffs software.

5 **Third Affirmative Defense**

6 Defendants' counterclaims against counterdefendants Hitek are moot, in whole
7 or in part, because counterdefendants Hitek are barred by the statute of limitations
8 from bringing a claim to the Plaintiff's copyright and therefore cannot, even if they
9 wanted to, have an interest in the Plaintiffs' software. Therefore, they cannot affect
10 the adjudication of Defendants' right to use or not use Plaintiffs software even if
11 they wanted, and complete relief can be granted.

12 **Fourth Affirmative Defense**

13 Defendants' counterclaims against counterdefendants Hitek are moot and/or
14 nonexistent because counterdefendants Hitek are barred by the statute of limitations
15 from bringing a claim to the Plaintiff's copyright and therefore cannot, even if they
16 wanted to, have an interest in the Plaintiffs' software. Therefore, they cannot affect
17 the adjudication of Defendants' right to use or not use Plaintiffs software even if
18 they wanted, and complete relief can be granted.

19 **Fifth Affirmative Defense**

20 Defendants' counterclaim of trespass to chattel against counterdefendants Hitek
21 is barred by the statute of limitations.

22 **Sixth Affirmative Defense**

23 Defendants' counterclaims against counterdefendants Hitek are barred, in
24 whole or in part, because Hitek is not an necessary party under Rule 19 since they
25 have no interest in the copyright of the subject software at issue nor were they
26 involved with the copyright registration at issue.

27 **Seventh Affirmative Defense**

1 Defendants' counterclaims against counterdefendants Hitek are barred, in
2 whole or in part, because Defendants' failed to properly join counterdefendants.

3 **Eighth Affirmative Defense**

4 Defendants' counterclaims of fraud and trespass to chattels are barred for lack
5 of subject matter jurisdiction because these claims are in essence state law claims
6 arising under state tort law and do not "arise under" the U.S. Constitution, federal
7 statutes or common law.

8 **Ninth Affirmative Defense**

9 Defendants' counterclaims are barred for lack of subject matter jurisdiction
10 because the underlying claims involve the interpretation of the rights arising under a
11 license agreement between Plaintiffs and Counterdefendant Hitek which is state
12 contract law that does not "arise under" the U.S. Constitution, federal statutes or
13 common law.

14 **Tenth Affirmative Defense**

15 Defendants' counterclaims against Counterdefendants Hitek are barred for lack
16 of subject matter jurisdiction because there is no "common nucleus of fact" giving
17 federal question supplemental jurisdiction over the claims of declaratory relief,
18 fraud and trespass to chattel.

19 **Eleventh Affirmative Defense**

20 Defendants' counterclaims against Counterdefendants Hitek are barred, in
21 whole or in part, by the doctrines of waiver, estoppel, laches, unclean hands.

22 **Twelfth Affirmative Defense**

23 Defendants counterclaims against Counterdefendants Hitek result in untimely
24 joinder causing prejudice to Counterdefendants Hitek and therefore they waived
25 their right to raise the claim.

26 **Thirteenth Affirmative Defense**

27 Defendants counterclaims against Counterdefendants Hitek are barred as

1 improper joinder under Rule 19 and failure to set forth the necessary facts.

2 **Thirteenth Affirmative Defense**

3 Defendants counterclaims against Counterdefendants Hitek are barred as
4 improper impleader because there is no grounds for transfer of liability.

5 **Fourteenth Affirmative Defense**

6 Defendants counterclaims against Counterdefendants Hitek are barred as
7 Defendants are not the United States Government and therefore do not have
8 standing to bring a claim of fraud on the Copyright Office on behalf of the United
9 States Copyright Office.

10 **Fifteenth Affirmative Defense**

11 Defendants counterclaims against Counterdefendants Hitek are barred as there
12 exists no enabling statute giving Defendants the right to act as private attorney
13 general and have standing to bring claims on behalf of the United States Copyright
14 Office.

15 **Sixteenth Affirmative Defense**

16 Defendants counterclaims against Counterdefendants Hitek are barred as there
17 exists no subject matter jurisdiction for Defendants' Declaratory since there exists
18 no "case or controversy" between Defendants' and counterdefendants because
19 counterdefendants never asserted a claim for copyright infringement against
20 defendants, and, even if they wanted to, they would be barred by the statute of
21 limitations.

22 **Seventeenth Affirmative Defense**

23 Any entry onto Defendants' computers was "invited" to enter Defendants'
24 computer by Defendants by its employee and agent John Christman by virtue of his
25 voluntarily download of the program which clearly disclosed the Tracking System.

26 **Eighteenth Affirmative Defense**

27 Counterdefendants Hitek presently have insufficient knowledge or information

1 upon which to form a belief as to whether additional affirmative defenses are
2 available. Accordingly, Counterdefendants hereby expressly reserve the right to
3 assert additional affirmative defenses in the event that discovery indicates such
4 defenses are appropriate.

5 WHEREFORE, Counterdefendants respectfully request that this Court dismiss
6 Defendants' Counterclaims Count 1 through 3 with prejudice, deny the relief sought
7 by Defendants, and enter a judgment in favor of Counterdefendants Hitek
8 dismissing the counterclaims, together with Costs, Attorneys' Fees and other relief
9 as the Court deems just and appropriate. 17 U.S.C. §505.

10
11 DATED: April 15, 2015

Respectfully submitted,

12 LAW OFFICE OF HEATHER BENNETT

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15 Heather D. Bennett, Esq.
16 Attorney for Counterdefendants Hitek and
17 Melvin Desilva
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